

No. 89-564

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In the Supreme Court of the United States
OCTOBER TERM, 1989

MAURICE GLOSEMEYER, ET AL., PETITIONERS

v.

MISSOURI-KANSAS-TEXAS RAILROAD CO., ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

MEMORANDUM FOR THE UNITED STATES

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), allows for the preservation of railroad rights-of-way for possible future railroad use by providing that such rights-of-way may be used on an interim basis as nature trails. Petitioners contend (Pet. 15-24) that Section 8(d) is unconstitutional because it effects a taking without just compensation, and because it exceeds the power given Congress by the Commerce Clause.

1. In 1968, Congress enacted the National Trails System Act, 16 U.S.C. 1241 *et seq.*, to establish a nationwide system of nature trails. As originally enacted, the Trails Act did not provide for the conversion of railroad rights-of-way to nature trails. Congress first addressed that possibility in Section 809 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 144-146; 49 U.S.C. 10906. Section 809 provided for: (1) studies aimed at preserving railroad rights-of-way, and (2) measures

encouraging the voluntary conversion of railroad lines to nature trails. Pet. App. A4-A5.

In 1983, Congress amended the Trails Act by adding Section 8(d). Section 8(d) was enacted "in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service." 16 U.S.C. 1247(d). See also H.R. Rep. No. 98-28, 98th Cong., 1st Sess. 8-9 (1983) ("previous congressional efforts have not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes"). To accomplish that goal, Section 8(d) modified the authority of the Interstate Commerce Commission (ICC or Commission) over the abandonment of rail lines.¹ Pet. App. A5.

Specifically, Section 8(d) of the Trails Act provides that rights-of-way that otherwise might be abandoned may be preserved and used on an interim basis as nature or recreational trails. Under Section 8(d), if a local government or private organization agrees to maintain the right-of-way for possible future railroad use, it may use the right-of-way as a nature trail. Pet. App. A5-A6. Section 8(d) expressly states that "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of rights-of-way for railroad purposes." 16 U.S.C. 1247(d). In short, Section 8(d) allows for the route to remain intact and available for possible future railroad use, while allowing the right-of-way to be used currently as a nature trail.

2. Petitioners are a group of landowners who claim to hold reversionary interests in a railroad right-of-way adjacent to their property. In September 1986, the Missouri-

¹ As a general matter, the ICC has plenary authority over the abandonment of rail lines. See 49 U.S.C. 10903; *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981).

Kansas-Texas Railroad Company filed with the ICC an application requesting authority to abandon a 199.92 mile section of railway between Machens and Sedalia, Missouri. While that application was pending, the Missouri Department of Natural Resources (DNR) requested that the right-of-way be made available to it pursuant to Section 8(d) of the Trails Act and the Commission's Trails Act Rules, 49 C.F.R. 1152.29, or alternatively through the Commission's imposition of a "public use" condition under 49 U.S.C. 10906. The railroad stated that it was interested in preserving the right-of-way in that manner. Accordingly, the ICC issued a Certificate of Interim Trail Use (CITU), which permitted the railroad and DNR to enter into an interim trail-use agreement.² Pet. App. A7-A8.

3. Prior to the issuance of the CITU, petitioners filed this action against the railroad, DNR, and DNR's Director in the Circuit Court of Warren County, Missouri. The action was removed to the United States District Court for the Eastern District of Missouri and the United States intervened. In the district court, petitioners sought a declaration that Section 8(d) and the ICC's implementing regulations are unconstitutional. The district court held that Sec-

² Under the Commission's regulations, the CITU permits the railroad to discontinue service over the line, cancel its tariffs with respect to the line, and salvage the track and other equipment. It also provides a 180-day period during which the railroad may negotiate with the parties interested in interim trail use. If an agreement with a trail user is negotiated—as in this case—interim use is thereby authorized. Should the trail user thereafter seek to terminate the arrangement, the railroad would have to return to the Commission for issuance of a full certificate of abandonment. If no trail-use agreement is reached, the CITU automatically converts into an effective certificate of abandonment, permitting the railroad to abandon its line immediately. See 49 C.F.R. 1152.29. See also *National Wildlife Federation v. Interstate Commerce Commission*, 850 F.2d 694, 698-699 n.5 (D.C. Cir. 1988).

tion 8(d) of the Trails Act constitutes a valid exercise of the Commerce Clause power and that it does not effect an unconstitutional taking under the Fifth Amendment, because petitioners may obtain just compensation (if warranted) in the Claims Court under the Tucker Act, 28 U.S.C. 1491. Pet. App. A8-A9.

4. The United States Court of Appeals for the Eighth Circuit affirmed. Pet. App. A1-A19. The court of appeals held that Section 8(d) is a valid exercise of Congress's Commerce Clause power. The court agreed with the Second Circuit that Section 8(d) "is 'a remarkably efficient and sensible way to achieve' " the legitimate goals of creating more nature trails and preserving rail corridors for future use. Pet. App. A13 (quoting *Preseault v. ICC*, 853 F.2d 145, 150 (2d Cir. 1988)).

The court of appeals also rejected petitioners' argument that Section 8(d) is unconstitutional because it will result in uncompensated takings of private property. The court assumed, without deciding, that Section 8(d) could result in a compensable taking. But the court ruled that compensation is available under the Tucker Act for any such taking. The court relied on this Court's decisions in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), which held that the Tucker Act is available for takings claims unless Congress expressed a clear intent to withdraw that remedy. Pet. App. A14-A19.

5. In this Court, petitioners renew their claim that Section 8(d) of the Trails Act is unconstitutional because it results in an uncompensated taking of property and exceeds Congress's authority under the Commerce Clause. As petitioners note (Pet. 11), this case raises the same questions that are before this Court in *Preseault v. ICC*, cert. granted, 109 S. Ct. 1929 (1989). The Court heard oral argument in *Preseault* on November 1, 1989. Accordingly, we agree with

petitioners' suggestion (Pet. 26) that this case should be held pending the Court's decision in *Preseault v. ICC*, and disposed of in light of that decision.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

DECEMBER 1989

* The Solicitor General is disqualified in this case.